A

ASEAN SECURITY PAPER MILLS SDN BHD

v.

MITSUI SUMITOMO INSURANCE (MALAYSIA) BHD

B

FEDERAL COURT, PUTRAJAYA
ABDUL HAMID MOHAMAD CJ
ZAKI TUN AZMI PCA
ZULKEFLI AHMAD MAKINUDIN FCJ
[CIVIL APPEAL NO: 02-17-2006 (A)]

C

22 MAY 2008

CIVIL PROCEDURE: *Jurisdiction of court - Federal Court - Application for review of Federal Court decision - Inherent powers of court - Finality - Whether fit and proper case for court to exercise its inherent*

D *jurisdiction - Rules of the Federal Court 1995, r. 137*

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Federal Court - Application for review of Federal Court decision - Inherent powers of court - Finality - Whether fit and proper case for court to exercise its inherent*

E *jurisdiction - Rules of the Federal Court 1995, r. 137*

This was an application by the applicant/respondent to have a decision of the Federal Court reviewed and reheard pursuant to r. 137 of the Rules of the Federal Court 1995 to prevent injustice or to prevent an abuse of the process of the court. The applicant/

F respondent, an insurance company acting together with another insurance company as co-insurers, issued to the respondent/ appellant a policy of insurance for security paper stored in a warehouse. The building together with all its contents was subsequently burnt down and the respondent/appellant made a

G claim from both insurance companies. When the insurance companies refused to honour the claim on the ground of fraud, the respondent/appellant filed a suit in the High Court, with the principal issue being whether the fire was the act of arsonists or caused by spontaneous combustion. The High Court judge

H concluded that the fire was the result of a spontaneous combustion but upon appeal by the applicant/respondent to the Court of Appeal, that decision was reversed. The respondent/ appellant then appealed to the Federal Court, which reinstated the findings of the High Court. Hence, the present application.

I

Held (dismissing the application)
Per Abdul Hamid Mohamad CJ & Zaki Tun Azmi PCA delivering the judgment of the court:

(1) Review jurisdiction should never be allowed to be used to question a finding of this court in an appeal on question of facts. In the instant application, the applicant was simply asking this court to exercise its review jurisdiction to set aside the decision of this court overturning the finding of facts made by the Court of Appeal and reinstating the decision of the trial judge on the facts. That was clearly outside the jurisdiction of this court. To allow the application was to invite all the vices that this court had been repeatedly warning against *ie*, there would be no finality in its judgment and it would encourage judge-shopping. (paras 12 & 13)

(2) Examining the facts adduced by both parties at the trial, the arguments at the Court of Appeal and this court, it was not possible to say that there had been a manifest error committed by this court when it decided to restore the decision of the High Court. It was not right for this court to say whether it was the High Court or the Court of Appeal or the Federal Court that was right or wrong. According to this country's system, it must be held that the Federal Court was right in arriving at its decision. There must be finality. There was no assurance that even if leave were given to review that decision of the Federal Court, the losing party would not claim injustice and seek another review. Where does it end? This court was not satisfied that there was any probability of the Federal Court's judgment being wrong and that injustice had or would occur to the applicant/respondent. Therefore, this was not a fit and proper case for this court to exercise its inherent jurisdiction to make any order for the case to be reviewed. *Chan Yock Cher v. Chan Teong Peng* (foll). (paras 49, 50, 53, 54 & 55)

Bahasa Malaysia *Translation*

Ini adalah permohonan oleh pemohon/responden untuk mengkaji semula dan mendengar semula satu penghakiman Mahkamah Persekutuan mengikuti k. 137 Kaedah-kaedah Mahkamah Persekutuan 1995 untuk mengelakkan ketidakadilan atau untuk mengelakkan penyalahgunaan proses mahkamah. Pemohon/responden, sebuah syarikat insurans yang bertindak dengan sebuah

lagi syarikat insurans sebagai penginsurans bersama, mengeluarkan kepada responden/perayu polisi insurans untuk kertas sekuriti yang disimpan di dalam sebuah gudang. Bangunan itu bersama-sama semua kandungannya kemudiannya terbakar hangus dan responden/perayu membuat tuntutan dari kedua-dua syarikat insurans tersebut. Apabila kedua-dua syarikat insurans tersebut enggan menghormati tuntutan tersebut di atas alasan fraud, responden/perayu telah memfail guaman di Mahkamah Tinggi, dengan isu utamanya sama ada pembakaran tersebut adalah lakuan arsonis atau disebabkan oleh pembakaran spontan. Hakim Mahkamah Tinggi memutuskan pembakaran tersebut adalah akibat pembakaran spontan tetapi setelah rayuan dibuat oleh pemohon/responden ke Mahkamah Rayuan, keputusan itu dibatalkan. Perayu/responden kemudiannya merayu ke Mahkamah Persekutuan, yang meletakkan semula dapatan Mahkamah Tinggi. Oleh itu, rayuan terkini dbuat.

Diputuskan (menolak permohonan)
Oleh Abdul Hamid Mohamad KHN dan Zaki Tun Azmi PMR menyampaikan penghakiman mahkamah:

(1) Bidangkuasa pengkajian semula sama sekali tidak patut dibenarkan untuk digunakan untuk menyoal dapatan mahkamah ini di dalam sesuatu rayuan berdasarkan soalan fakta. Dalam permohonan terkini, pemohon hanya meminta mahkamah ini menggunakan bidangkuasa mengkaji semulanya untuk menolak keputusan mahkamah ini yang membatalkan dapatan fakta yang dibuat oleh Mahkamah Rayuan dan meletakkan semula keputusan hakim perbicaraan berdasarkan fakta. Itu jelas terletak di luar bidangkuasa mahkamah ini. Untuk membenarkan permohonan ini seumpama mengundang semua maksiat yang mahkamah ini berulangkali memberi amaran terhadap, iaitu, tidak akan terdapat kemuktamadan dalam penghakimannya dan ia akan menggalakkan pemilihan hakim.

(2) Setelah mengkaji fakta yang dikemukakan oleh kedua-dua pihak di perbicaraan, penghujahan di Mahkamah Rayuan dan mahkamah ini, ia tidak dapat dikatakan terdapat kesalahan ketara yang dibuat oleh mahkamah ini apabila ia berkeputusan untuk meletak semula keputusan Mahkamah Tinggi. Ia tidak patut bagi mahkamah ini untuk mengatakan sama ada Mahkamah Tinggi atau Mahkamah Rayuan atau Mahkamah Persekutuan yang betul atau salah. Mengikut sistem negara ini, ia mesti diputuskan bahawa Mahkamah Persekutuan betul

apabila mencapai keputusannya. Kemuktamadan mesti ada. Walaupun kebenaran diberi untuk mengkaji keputusan Mahkamah Persekutuan tersebut, tiada kepastian bahawa pihak yang kalah tidak akan mendakwa ketidakadilan telah berlaku dan menuntut satu lagi pengkajian semula. Di mana akan ia berakhir? Mahkamah ini tidak berpuashati bahawa terdapat kemungkinan penghakiman Mahkamah Persekutuan salah dan ketidakadilan telah atau akan terjadi kepada pemohon/responden. Oleh itu, ini bukanlah kes yang sesuai bagi mahkamah ini menggunakan bidangkuasa semula jadinya untuk memerintah pengkajian semula kes.

Case(s) referred to:

Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor [2008] 5 CLJ 1 FC ***(refd)***

Adorna Properties Sdn Bhd v. Kobchai Sosothikul [2005] 1 CLJ 565 CA ***(refd)***

Allied Capital Sdn Bhd v. Mohd Latiff Shah Mohd & Another Application [2004] 4 CLJ 350 FC ***(refd)***

Bremer Vulkan v. South India Shipping [1981] 1 All ER 289 ***(refd)***

Chan Yock Cher v. Chan Teong Peng [2005] 4 CLJ 29 FC ***(foll)***

Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61 FC ***(refd)***

Chu Tak Fai v. PP [2006] 4 CLJ 931 FC ***(refd)***

Dato' Mohamed Hashim Shamsuddin v. The Attorney General, Hong Kong [1986] 1 CLJ 377; [1986] CLJ (Rep) 89 SC ***(refd)***

Dato' Seri Anwar Ibrahim v. PP and Another Appeal [2004] 3 CLJ 737 FC ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2004] 4 CLJ 157 FC ***(refd)***

Joceline Tan Poh Choo & Ors v. V Muthusamy [2007] 6 MLJ 485 ***(refd)***

Lye Thai Sang & Anor v. Faber Merlin (M) Sdn Bhd & Ors And Another Case [1985] 2 CLJ 423; [1985] CLJ (Rep) 196 SC ***(refd)***

Megat Najmuddin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(refd)***

MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Re Uddin [2005] 3 All ER 550 ***(refd)***

Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim [2008] 5 CLJ 201 FC ***(refd)***

Tai Chai Yu v. The Chief Registrar of the Federal Court [1998] 2 CLJ 358 CA ***(refd)***

Taylor & Anor v. Lawrence & Anor [2002] 2 All ER 353 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 16(a), 17, 101
Federal Constitution, art. 128
Rules of the Federal Court 1995, r. 137

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 37, para 12

For the appellant - VS Viswanathan (A Mahendran, CK Leong, A Suppiah, Haresh Mahadevan, Stanislaus Vethanayagam & Maris Regina with him); M/s CK Leong & Co
For the respondent - Porres Royan (Anad Krishnan & T Sudhar with him); M/s Shook Lin & Bok
Watching brief for Bank Negara Malaysia - Wong Chong Wah
Watching brief for Persatuan Insuran Am Malaysia - T Sagadevan

Reported by Suresh Nathan

JUDGMENT

Abdul Hamid Mohamad CJ:

[1] I have had the privilege of reading the draft judgment of the learned President of the Court of Appeal. I agree with his conclusion. However, I wish to emphasize a few points.

[2] The first thing that must be borne in mind is that this court is not hearing an appeal from the decision of the Court of Appeal. That, this court had done and the judgment of this court was delivered on 2 February 2007. What is before us now is an application for this court to review its own decision. The application is made under r. 137 of the Rules of the Federal Court 1995 ("RFC 1995)" and/or its inherent jurisdiction.

[3] Secondly, it must also be borne in mind that a court decides a case on the evidence adduced in court, not on public opinion, even though, it may be that the public opinion represents the truth of what had actually happened. To give a simple example, someone is dead and public opinion is that he has been murdered by the accused person. But, if the charge is not proved beyond reasonable doubt according to law, the murderer may be acquitted by the court. After all the court is a court of law, not of public opinion. The case of *Dato' Seri Anwar Ibrahim v. PP and Another Appeal* [2004] 3 CLJ 737 is a good example.

[4] In an application for a review by this court of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made. Only if it does, that the court reviews its own earlier judgment. Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such. In other words, it is not for the court to consider whether this court had or had not made a correct decision on the facts. That is a matter of opinion. Even on the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion. An occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court's earlier judgments. If a party is dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken up in another appeal in a similar case. That is what is usually called "revisiting". Certainly, it should not be taken up in the same case by way of a review. That had been the practice of this court all these years and it should remain so. Otherwise, there will be no end to litigation. A review may lead to another review and a further review. This court has so many times warned against such attempts. See:

1. *Lye Thai Sang & Anor v. Faber Merlin (M) Sdn. Bhd.* [1985] 2 CLJ 423; [1985] CLJ (Rep) 196.
2. *Adorna Properties Sdn. Bhd. v. Kobchai Sosothikul* [2005] 1 CLJ 565.
3. *Allied Capital Sdn. Bhd. v. Mohd. Latiff Bin Shah Mohd. & Another Application* [2004] 4 CLJ 350, in particular the dissenting judgment of Abdul Hamid Mohamad, FCJ.
4. *Tai Chai Yu v. The Chief Registrar of the Federal Court* [1998] 2 CLJ 358.
5. *Chan Yock Cher v. Chan Teong Peng* [2005] 4 CLJ 29.
6. *Chu Tak Fai v. Public Prosecutor* [2006] 4 CLJ 931.

[5] Coming back to r. 137 of the RFC 1995, I have dealt at length on the effect of the rule in *Abdul Ghaffar Md. Amin v. Ibrahim Yusoff & Anor* [2008] 5 CLJ 1 and in *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201. In the former case I concluded:

> In other words, rule 137 cannot be construed as to confer any new jurisdiction to the existing jurisdiction of the Federal Court as spelt out under the Federal Constitution, the Courts of Judicature Act and other statutes.

[6] However, I accept that, in very limited and exceptional cases, this court does have the inherent jurisdiction to review its own decision. I must stress again that this jurisdiction is very limited in its scope and must not be abused. I have no difficulty in accepting that inherent jurisdiction may be exercised in the following instances:

[7] First, where there is a lack of quorum as in *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61 where two of the presiding judges had retired at the time when the judgment was delivered and only one judge remaining who was capable of exercising his functions as a judge of that court.

[8] Secondly, where the decision had been obtained by fraud or suppression of material evidence as in *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577.

[9] Thirdly, where there is a clear infringement of statutory law. In this respect, a clear example would be where the court has mistakenly applied a repealed law. But, where it is a matter of interpretation or application of the law, it is in my view not a suitable case for a review. The judgment of this court is *Adorna Properties Sdn. Bhd. v. Kobchai Sosothikul* [2005] 1 CLJ 565 does throw some light in this respect.

[10] Fourthly, where application for review has not been heard by this court but, through no fault of the applicant, an order was inadvertently made as if he has been heard as in *Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai and others* AIR (1941).

[11] Fifthly, where bias has been established as in *Taylor & Anor v. Lawrence & Anor* [2002] 2 All ER 353.

[12] Of course, there may be other circumstances. But, the review jurisdiction should never be allowed to be used to question a finding of this court in an appeal on question of facts.

[13] That leads us to the instant application. What is this applicant seeking to do? It is simply to ask this court to exercise its review jurisdiction to set aside the decision of this court overturning the finding of facts made by the Court of Appeal and reinstating the decision of the trial judge on the facts. That is clearly outside the scope of the review jurisdiction of this court. To allow the application is to invite all the vices that this court has been repeatedly warning against ie, there will be no finality in its judgment and, it will encourage judge-shopping.

[14] I would dismiss the application with costs.

Zaki Tun Azmi PCA:

Introduction

[15] "This case cries out for justice!" So his counsel started off his written submission. He complained that there had been injustice against his client.

[16] According to him, this court had unjustifiably reversed the decision of the Court of Appeal. The decision of the Federal Court, according to him, was based on entirely erroneous factual premises. The result of that order of the Federal Court made on 2 February 2007 according to him has caused grave injustice to his client.

This Application

[17] The applicant/respondent has now moved this court by way of notice of motion to have that decision of the Federal Court reviewed and reheard pursuant to r. 137 of the Rules of the Federal Court to prevent injustice or to prevent an abuse of the process of the court.

Background

[18] Let us first look at the facts of the case. The applicant/respondent was an insurance company acting with another insurance company as co-insurers. They have issued to the respondent/appellant a policy of insurance, for an amount initially of RM14.932 million but this insured sum was subsequently, in

A August 1989, increased to RM32.431 million. The subject matter of the insurance was security paper which was originally stored in Kuala Lumpur but was later transferred to a warehouse in Kampung Acheh, Sitiawan. About one month after the amount of the insured sum was increased, ie, on 11 September 1989, the B Kampung Acheh warehouse where the security paper was stored was on fire. The building together with its contents was all burnt down. The respondent/appellant therefore made a claim from both insurance companies. The applicant/respondent refused to pay on the ground that the claim was fraudulent and in breach of C Condition 13 of the insurance policy which provides that if the claim is in any respect fraudulent or if fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under the policy or if the laws or damage occasioned by the willful act or connivance of the insured.

D

[19] When the insurance companies, refused to honour the claim, the respondent/appellant filed a suit at the High Court at Ipoh. The principal issue before the High Court at Ipoh was whether the fire was the act of arsonists or whether it was caused by E spontaneous combustion. Many witnesses were called by both sides. The applicant/respondent relied on evidence of people who were allegedly personally involved in starting the fire. According to some of the applicant/respondent's witnesses, one Balasingam, who was the director and a minority shareholder in the respondent/ F appellant company was the one who paid them to start the fire and that the fire took place at 1.30am in the early morning of 11 September 1989. The respondent/appellant's expert witnesses on the other hand were the chemists (namely, Mr. Amar Singh and Professor Dato' Dr. Chan Kai Cheong mentioned in the question G referred to the Federal Court discussed later) who testified that the fire was a result of a spontaneous combustion and that the fire took place at 4pm on the same date.

[20] The learned trial judge concluded that it was not arson but H was the result of a spontaneous combustion. In short, he believed one set of witnesses against the evidence of another set of witnesses, which he was entitled to do. He gave reasons why he chose to accept those witnesses rather than, on a balance of probabilities, the other set of witnesses.

I

[21] The applicant/respondent, being dissatisfied with this decision exercised their right to appeal to the Court of Appeal. The Court of Appeal reheard the case and in so doing, examined all the facts in detail and concluded that the trial judge had not properly appreciated the facts. The Court of Appeal concluded there was fraud on the part of Balasingam. It gave eleven (11) grounds for reversing the decision of the trial judge and concluded that the fire was caused by arsonists in the early hours of 11 September 1989. It held that Balasingam was the perpetrator of this arson and his acts being the act of a director and a person in control of the respondent/appellant company, amounted to the act of the company. It went on to examine the law before concluding that the act of Balasingam amounted to the act of the company. The insured company therefore failed in its claim to receive the sum insured. At this stage, it is also difficult to say that the Court of Appeal was wrong in making those decisions. It supported its decision with detailed reasoning and legal authorities.

[22] It should be noted that both counsels for respondent and counsels for appellant in the Court of Appeal mutually agreed that the appeal before the Court of Appeal "turns solely on questions of fact" – see grounds of judgment of the Court of Appeal.

Questions

[23] Then came the turn of the respondent/appellant to seek for a reversal of the Court of Appeal's order in the Federal Court. It sought for and obtained leave to refer to the Federal Court the following two questions:

1. Whether it is opened to an appellate court to totally disregard (in the sense of not adverting at all to) the evidence and findings of two (2) experts one of whom was a Senior Government Chemist and Director of the Chemistry Department, Perak, Mr. Amar Singh (PW9) and the other a respected retired Professor Dato' (Dr.) Chan Kai Cheong (PW11) who both conducted investigations and tests of the site on the issue of arson, which issue is the most crucial in these proceedings and that significantly their evidence and findings had cast serious doubts that the fire was a result of arson and that it could have been caused by "spontaneous combustion" and whether it is competent for the Court of Appeal to rely more on the so called circumstantial evidence as opposed to the direct and scientific evidence in reversing a decision of a trial court.

A

2. Whether it is competent for the Court of Appeal to hold that the acts of a single shareholder/Director binds the company when the shareholder/Director was not acting in the course of his employment.

B

[24] The Federal Court heard the appeal on these two questions. In so doing, it also looked at the judgment of the High Court and that of the Court of Appeal and concluded that the decision of the High Court should be upheld. Again, the Federal Court went into detailed discussions of the facts adduced at the High Court as well as the eleven grounds given by the Court of Appeal before deciding so.

C

[25] In its grounds of judgment, the Federal Court also considered the second question. In fact, in my opinion, this was not necessary because the first question being answered in the negative, the decision whether the director's acts amounted to the act of the respondent/appellant company became irrelevant.

D

[26] There are now before us three sets of decisions on findings of facts, two (at the High Court and the Federal Court) decided on facts that the fire was caused by spontaneous combustion while one (that of the Court of Appeal) held that the claim was fraudulent since the fire was caused by the director of the respondent/appellant company.

E

[27] This case has been much talked about within the insurance industry. The amount involved is very large. If it is truly a fraudulent claim, it is bad for the insurance business. Be as it may, this court will have to decide this case as it does in respect of any other cases, irrespective of who the parties are.

F

G

What Is r. 137

[28] In the circumstances, should this court invoke its inherent jurisdiction to hear the case all over again? This depends on the interpretation of r. 137 of the Federal Court Rules 1995. The rule reads:

H

> **For the removal of doubts** it is hereby declared that nothing in these Rules shall be deemed to limit or affect the **inherent powers** of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court. (emphasis added)

I

[29] It will be noticed that the rule starts with the words "For the removal of doubts …" It is therefore clear that this rule does not actually confer the jurisdiction to hear any application or to make any order to prevent injustice or abuse of the process of the court. It is merely a reminder that this court has that inherent jurisdiction. In fact, it was stated by Salleh Abas LP in *Dato' Mohamed Hashim bin Shamsuddin v. The Attorney General, Hong Kong* [1986] 1 CLJ 377; [1986] CLJ (Rep) 89:

> It is also interesting to see how the so-called additional powers were introduced in the 1948 Ordinance by section 99A thereof *(supra)*. The powers were described by the section as "the further powers" and these were "in amplification" of the powers conferred by the Ordinance or "inherent in any court". Neither in derogation nor prejudicing the generality of the powers expressly conferred. *It seems therefore that even without an express provision in the statute regarding this matter, the Court seems to have it and have it since the commencement of the 1948 Ordinance. It is a sort of power that should be implied or amplified from the very nature of judicial powers expressly conferred upon the Court; its express mention being merely declaratory of the existence of the power,* and thus its silence does not mean the disappearance of its existence. (emphasis added)

[30] That was a case where the question was whether the High Court had the power to take evidence upon a letter of request issued by the Hong Kong High Court. There was originally such a power specifically mentioned in the Schedule to the Courts Ordinance 1948 but it was omitted when the Courts of Judicature Act 1964 was enacted in place of the Ordinance.

[31] The Rules of the Federal Court 1995 was made by the Rules Committee pursuant to delegated powers under ss. 16 and 17 of the Courts of Judicature Act 1964. Section 16 sets out the areas where the Rules Committee may make rules of the court.

> 16. Rules of court may be made for the following purposes:
>
> (a) **For regulating and prescribing the procedure** (including the method of pleading) and the practice to be followed in the High Court, [the Court of Appeal and the Federal Court] in all causes and matters whatsoever in or with respect **to which those Courts have for the time being jurisdiction** (including the procedure and practice to be followed in the registries of those Courts), and any matters incidental to or relating to any such procedure or practice, including (but

A

> without prejudice to the generality of the foregoing provision) the manner in which, and the time within which, any applications which are to be made to a High Court [to the Court of Appeal or to the Federal Court] shall be made; (emphasis added)

B

[32] Notice that under s. 16(a) the rule making power is only in or with respect to which those courts have for the time being jurisdiction. It is not intended to confer any jurisdiction as intended to by art. 128 of the Federal Constitution. The Federal Court derives its judicial function from federal laws and although the

C

Rules of the Federal Court are federal laws, they are not intended to confer any new jurisdiction.

[33] In fact, this has been the interpretation since 1986. In *Dato Mohamed Hashim Shamsuddin v. Attorney-General, Hong Kong*

D

(supra), Abdoolcader SCJ said:

> This legislative provision clearly relates to a matter of practice and procedure with no question arising of creating or altering substantive rights or of any rules made pursuant thereto purporting *per se* to confer jurisdiction where none existed

E

> otherwise, and it is this specific enactment in the 1964 Act that enables the necessary rules to be spelt out to regulate the procedure for the purposes specified therein.

[34] Later in *R Rama Chandran v. Industrial Court of Malaysia &*

F

Anor [1997] 1 CLJ 147, the Federal Court referred to the Rules of the High Court and said at p. 212:

> The next topic to be logically considered in this context, is the status of the Rules of the High Court 1980.

G

> By s. 17(1) of the Courts of Judicature Act 1964, powers are conferred upon the Rules Committee to make 'rules of court' for the purpose of regulating and prescribing the practice and procedure to be followed in the respective courts for which each of them is constituted but within the strict limits defined by s. 16.

H

> The most decisive limitation placed on the powers of the Rules Committee, and indeed on the other rule-making authorities, is that they extend to regulating the 'practice and procedure of the High Court and other courts for which the Rules are made. Although these powers are wide, yet it cannot be gainsaid, that

I

> they do not extend into the area of substantive law. Clearly, there is a vital distinction made between, on the one hand, substantive

> law, the function of which is to define, create, confer or impose legal rights and duties, and on the other hand, procedural law, the function of which is to provide the machinery, the manner or means, by recourse to which legal rights and duties may be enforced or recognized by courts of law or any tribunal seized with jurisdiction to adjudicate on a dispute before it.

[35] From the wording of s. 16, it is clear that what is delegated to the Rules Committee is only to make rules relating to practice and procedure, and not to affect substantive rights and duties.

Inherent Jurisdiction

[36] What then is the meaning of inherent jurisdiction? According to the Concise Oxford Dictionary, "inherent" means "existing in something, esp. as a permanent or characteristic attribute." In the context of the law, that inherent jurisdiction is deemed to be part of the court's power to do all things reasonably necessary to ensure fair administration of justice within its jurisdiction subject to valid existing laws including the Constitution. In other words, that inherent power is found within the very nature of a court of law, unlike power conferred by statute.

[37] The *Halsbury's Laws of England,* 4th edn in vol 37 at para 12 refers to "inherent jurisdiction" as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[38] In *Bremer Vulkan v. South India Shipping* [1981] 1 All ER 289 at 295, Lord Diplock speaking on the subject of dismissing a pending action for one of prosecution said:

> The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an 'inherent power' the exercise of which is within the 'inherent jurisdiction' of the High Court. It would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs **must have power to do in order to maintain its character as a court of justice.** (emphasis added)

[39] There is no doubt that this court has that authority to allow this application. Whether it does so, depends on the circumstances of each case. This court has on many previous occasions decided that it has the right to order a review of its own decision to prevent injustice or an abuse of the process of the court. It has that very wide discretion. However, that wide discretion will not be used liberally but only sparingly, in exceptional cases and on a case to case basis where a significant injustice had probably occurred and there was no alternative effective remedy. The court must exercise strong control over such application. It must be satisfied that it is within exceptional category. Rule 137 cannot be construed as conferring unlimited power to review its earlier decision for whatever purpose. The court must not be too eager to invoke the rule.

[40] Some of the circumstances in which this discretion should be exercised or not, are as follows:

a. That there was a lack of quorum eg, the court was not duly constituted as two of the three presiding judges had retired. (*Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61).

b. The applicant had been denied the right to have his appeal heard on merits by the appellate court. (*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645)

c. Where the decision had been obtained by fraud or suppression of material evidence. (*MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577)

d. Where the court making the decision was not properly constituted, was illegal or was lacking jurisdiction, but the lack of jurisdiction is not confined to the standing of the quorum that rendered the impugned decision. (*Allied Capital Sdn Bhd v. Mohd Latiff bin Shah Mohd and another application* [2004] 4 CLJ 350)

e. Clear infringement of the law. *(Adorna Properties Sdn Bhd v. Kobchai Sosothikul* [2005] 1 CLJ 565)

f. It does not apply where the findings of this court is questioned, whether in law or on the facts (since these are matters of opinion which this court may disagree with its earlier panel). (*Chan Yock Cher @ Chan Yock Kher v. Chan Teong Peng* [2005] 4 CLJ 29)

g. Where an applicant under r. 137 has not been heard by this court and yet through no fault of his, an order was inadvertently made as if he had been heard. (*Raja Prithwi Chand v. Sukhraj Rai* [AIR] 1941)

h. Where bias had been established. (*Taylor & Anor v. Lawrence & Anor* [2002] 2 All ER 353)

i. Where it is demonstrated that the integrity of its earlier decision had been critically undermined e.g. where the process had been corrupted and a wrong result might have been arrived at. (*Re Uddin* [2005] 3 All ER 550)

j. Where the Federal Court allows an appeal which should have been consequentially dismissed because it accepted the concurrent findings of the High Court and Court of Appeal. (*Joceline Tan Poh Choo & Ors v. V. Muthusamy* [2007] 6 MLJ 485)

[41] These are but just instances where the court has exercised its discretion to invoke r. 137. There may be many other instances where r. 137 may apply as can be seen from Civil Procedure books where High Courts exercise their inherent jurisdiction to prevent injustice or abuse of the process of the court. By the very meaning of "inherent", as discussed earlier, it is not wise to even attempt to list out the other instances where this court should exercise such discretion. It is best to leave the question open and decide the applications as they come before this court. Inherent jurisdiction is not something conferred by the statute but which it has by its very nature of being a court to enable it to do justice and prevent injustice.

[42] Let us now examine whether this case is one where the Federal Court should exercise its discretion under r. 137.

Justice

[43] Rule 137 uses the term "injustice". What is it?

[44] Now, "justice" is a very wide and general term. Jurists through the years since Aristotle and Plato have tried to define justice and each has his own definition. It is not necessary for me to delve into that for the purpose of this judgment. Any party who has lost a case will always claim that there has been injustice against him while the successful party will plead otherwise. In our system, the court's function is to hear and decide to the best of its ability, honestly, and after carefully considering all the evidence adduced before it, makes a decision. Based on its findings and applying the law as the judge understands, he arrives at his conclusion. That to my mind, in the context of this case, is justice. The decision may not be accepted by the unsuccessful party. But that is the best that an honest and an impartial judge can decide.

[45] There must be a finality to deciding any dispute. It cannot be reviewed *ad infinitum*. It must end somewhere and in our system, it is the Federal Court. If there is any intention that r. 137 be read as conferring appellate jurisdiction, this court cannot also sit as an appellate court to hear appeals from itself. (See art. 128 of the Federal Constitution and the decisions of the Federal Court in the cases of *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor* [2008] 5 CLJ 1 and *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201.

[46] Judges are mere mortals. They do not have ability to determine what had truly and actually taken place except to base their decision on legally admissible evidence adduced before them by the parties. The judges must arrive at a conclusion to the best of his ability. A judge who cannot make or delays his decision is not a good judge.

Application To The Facts

[47] Applying the interpretation of r. 137 as discussed above to the facts, was there any injustice done to the applicant/respondent or was there an abuse of the process of the court. In this case, the decision was based on the finding of facts by the trial court, not so much on the law. The High Court held that the fire was as a result of spontaneous combustion and not arson as claimed to be by the applicant/respondent. Finding of facts are normally

left to the trial judge who has the benefit of seeing and assessing the witnesses but in this case the Court of Appeal decided that it should interfere with the finding of the trial judge and did so by reassessing the evidence of the witnesses. The Court of Appeal reversed the decision and held that was the act of arson by Balasingam, a director of the respondent/appellant company. When, by leave given, this court heard the two questions posed by the respondent/appellant to this court, this court decided that the High Court judge was right in its decision. This court in turn reinstated the findings of the High Court and reversed the decision of the Court of Appeal.

[48] As I had said earlier, the legal question of the director's responsibility to the respondent/appellant company is not necessary to be decided if it was held that the fire was not as the result of the act of the director. Only if the fire has been the act of the director, is it relevant whether that act of the director is the act of the respondent/appellant company.

Finality

[49] Should this court now reconsider the findings of this court and possibly arrive at another decision? Examining the facts adduced by both parties at the trial, the arguments at the Court of Appeal and this court, it is not possible to say that there has been a manifest error committed by this court when it decided to restore the decision of the High Court. It is not right for me to say whether it was the High Court or the Court of Appeal or the Federal Court was right or wrong. According to our system, it must be held that the Federal Court was right in arriving at its decision. There must be a finality. In England, the House of Lords is the apex court and in the United States of America, the Supreme Court. Before the right of appeal to the Privy Council was abolished, the Privy Council was our apex court.

[50] There is no assurance that even if leave is given to review that decision of the Federal Court, the losing party will not claim injustice and seek for another review. Where does it then end? In *Lye Thai Sang & Anor v. Faber Merlin (M) Sdn. Bhd. & Ors.* [1985] 2 CLJ 423; [1985] CLJ (Rep) 196, this is what my learned Chief Justice, Abdul Hamid CJ (Malaya) (as he then was) in the Supreme Court said:

A The question before the Court is, therefore, whether sub-section (4) can be construed to confer an unlimited power on the Supreme Court to **review, meaning to re-open, re-examine and re-consider** with a view to correction, variation, alteration or reversal, if necessary, an earlier decision in an appeal that has already been heard and disposed of.

B

Our view is that there is no merit in the contention made by the applicants. Sub-section (4) of the Act cannot be construed to mean that it confers unlimited power upon the Supreme Court to re-open, re-hear or re-examine, if necessary, to reverse or set C aside a judgment given in an appeal already heard and disposed of by it. So to construe would indeed not only be contrary to the clear meaning to the words used in section 69 but also contrary to Article 128(1) of the Federal Constitution.

Article 128(3) states that "the jurisdiction of the Supreme Court D to determine appeals from a High Court or a judge thereof shall be such as may be provided by federal law.

The Courts of Judicature Act, 1964 is such a law made pursuant to Clause (3) of Article 128.

E With respect to appeals, section 41 of the Act provides that appeals shall be decided in accordance with the opinion of the majority of judges composing the Court. Read in the light of section 67(1), the jurisdiction of the Supreme Court in regard to civil appeals shall specifically be to hear an appeal from any F judgment or order of any High Court. There is certainly no provision which confers jurisdiction on a Supreme Court to hear and determine appeals from a decision given in an appeal it has already heard and disposed of.

Where, therefore, a final decision has been delivered, an appeal is G in effect heard and disposed of. **In other words, it is brought to a final conclusion.** And that being the case, the Supreme Court has no power to re-open, re-hear and re-examine its decision for whatever purpose. The only exception where there can be a re-hearing is only to the extent provided by section 42, in particular sub-section (3) of section 42. The other exception is as provided H under section 44 sub-section (3) to the effect that every order such as that envisaged in sub-section (1) of section 44 may be discharged or varied by the full Court. (emphasis added)

[51] Sections 42 and 44 referred to in that judgment have since I been amended with the restructure of the appellate courts on 24 June 1994 ie, the creation of another appellate level, the Federal Court. What was Supreme Court is now known as the Court of

Appeal. In fact, now s. 101 of the Courts of Judicature Act 1964 prevents any judgment or order of the High Court from being reversed or varied on appeal or be ordered a retrial by the Federal Court unless it affects the merits or the jurisdiction of the court. I quote the judgment of the case of *Dato' Seri Anwar Ibrahim v. PP* [2004] 4 CLJ 157 at p. 193:

> On the issue of relitigation, it is useful to rely on the *dicta* of Eusoffe Abdoolcader FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v. PP* [1983] 2 MLJ where the learned judge said (at p 271):
>
> … *This attempt to relitigate and reopen an issue conclusively decided in respect of the same proceedings and between the same parties would appear to us to be as clear an instant of an abuse of the process of the court* as one can find within the connotation thereof enunciated in the speech of Lord Diplock in *Hunter v. Chief Constable of the West Midlands Police & Ors* [1982] AC 528, 542 which was applied by this court in *Tractors Malaysia Bhd. v. Charles Au Yong* [1982] 1 MLJ 320, 321.
>
> Rule 137 of the Rules of the Federal Court 1995 allows the Federal Court to exercise its inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. The rule has been invoked by the Federal Court in a number of cases like *Chia Yan Teck & Anor v. Ng Swee Kiat & Anor* [2001] 4 MLJ 1 and *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673. However, it must be observed that its application was only in limited circumstances. *If there were to be a liberal application of r. 137 then there would be chaos in our system of judicial hierarchy. Hence we would think that it is on a case by case basis. Certainly it cannot be the intention of the legislature when promulgating r. 137 that every decision of this court is subject to review. To do so would be against the fundamental principle that the outcome of litigation should be final.* (emphasis added)

[52] The Federal Court in *Adorna Properties Sdn Bhd v. Kobchai Sosothikul* [2005] 1 CLJ 565 at p 572 said:

> Secondly, there is much force to be given to the contention that there should be finality to any litigation. The main judgment was handed down by this court which is the apex court of this country. *If the application of r. 137 is made liberally the likely consequence would be chaos to our system of judicial hierarchy.* There would then be nothing to prevent any aggrieved litigant from challenging any decision on the ground of 'injustice' *vide* r. 137. (emphasis added)

[53] I am therefore not satisfied that there is any probability of the Federal Court's judgment being wrong and that injustice has or will occur to the applicant/respondent. As was said by my learned Chief Justice, Abdul Hamid Mohamad when he was a Federal Court Judge in *Chan Yock Cher v. Chan Teong Peng* [2005] 4 CLJ 29 at p. 45 para h:

> It has been seen that the applicant questions the findings of this court both in law and on facts. These are matters of opinion. Just because we may disagree (we do not say whether we agree or disagree with such findings) with the earlier panel of this court, that is not a ground that warrants us to review the decision.

[54] I would apply the same reasoning to the present case.

[55] I therefore find this is not a fit and proper case for this court to exercise its inherent jurisdiction to make any order for the case to be reviewed. This application is dismissed with costs.

[56] Both my learned Chief Justice Abdul Hamid Haji Mohamad, and brother Zulkefli Ahmad Makinudin, FCJ have read this judgment and agreed with it.